

Consultations Regarding the Disposition of  
Culturally Unidentifiable Native American Human Remains  
In the Possession, Custody or Control of the Maryland Historical Trust

November 2, 2007

**INTRODUCTION**

The Maryland Historical Trust (MHT) is a State agency with statutory and regulatory mandates to care for and curate certain archeological collections (State Finance and Procurement Article, Title 5A. Division Of Historical And Cultural Programs, Subtitle 3. Maryland Historical Trust, § 5A-326 (c) (3), and 335 (a)). Among these extensive collections are Native American human remains. The majority of these remains were recovered during the middle decades of the last century, and all are skeletal and to some degree fragmentary. As a result of their condition, enumerating the remains is difficult, but at least 139 Native American individuals are represented. The remains were recovered from 21 sites dating to before European contact. Current archeological practice and State professional protocol actively discourage the disturbance of interred human remains, and in fact seek to avoid excavation of such remains and preserve them in-place whenever possible. In addition, current State practice regarding consideration of new collections that include human remains views appropriate reburial as more desirable than accession.

In 1994, then Secretary of the Maryland Department of Housing and Community Development Jacqueline H. Rogers designated an appropriate 'interim' place of repose for Native American human remains in the possession, custody or control of the Maryland Historical Trust (MHT). This determination set aside a place at Jefferson Patterson Park and Museum (JPPM) to serve as a place of repose for those "remains without known affiliation." This determination met regulatory requirements established in Code of Maryland Regulations Title 05, Subtitle 08, Chapter 07 (COMAR 05.08.07) "Transfer of Human Remains and Associated Funerary Objects." The Secretary's determination rightly identifies this place as an 'interim place of repose' because, under the regulations, all human remains so kept are subject to "claim by, and approval of transfer to, claimants."

In the 13 years since Secretary Rogers' determination, the Native American human remains in the MHT collections have been kept in accordance with the relevant State regulations and Secretary Rogers' determination: they are not intermixed, they are not in open view or accessible except as required by law to ensure preservation, their environment is conducive to long-term preservation, and it is possible to remove the human remains for transfer to claimants. To date, no remains have been transferred. In addition, there is a growing sense among groups identifying themselves as Maryland Indians, and among those tasked with caring for the place of interim repose, that a more permanent and suitable solution to the repose or disposition of the human remains should be sought. This document describes a plan formulated by the MHT staff that is designed

to assist the Secretary of the Maryland Department of Planning (the Secretary) with reconsideration of the designated appropriate place of repose and disposition of the Native American human remains in MHT's care.

## **Law and Regulations**

Any plan that might lead to a change in the disposition of those Native American Human Remains held by the MHT must consider relevant laws and regulations. These include the Native American Graves Protection and Repatriation Act (NAGPRA)(Public Law 101-601, 25 U.S.C. 3001 et seq.) and implementing regulations (43 CFR Part 10), and the Maryland Code establishing the Maryland Historical Trust (State Finance and Procurement Article, Title 5A. Division of Historical and Cultural Programs, Subtitle 3. Maryland Historical Trust), particularly that section defining the process of Transfer of Human Remains (§ 5A-339 (b-d)) and implementing regulations (COMAR 05.08.07).

### NAGPRA

Applicability. NAGPRA is a Federal law that expresses the intent of the Federal government to facilitate the return of Native American human remains to lineal descendants or culturally affiliated Indian tribes. The law directs Federal agencies and museums with possession or control over collections of Native American human remains to: (1) compile an inventory of these remains that is to include, to the extent possible, an identification of the cultural affiliation of the remains, and (2) share the inventory with potential claimants and the Department of the Interior, and (3) facilitate and expedite repatriation to successful claimants. As a State agency having possession of, or control over, Native American cultural items, and receiving Federal funds, the MHT is defined as a museum under NAGPRA.

Inventory and Repatriation. In compliance with the regulations implementing NAGPRA, 43 CFR Part 10.9, the Maryland Historical Trust completed an inventory of Native American human remains in 1995. This inventory, periodically updated, has been provided to the National Park Service's National NAGPRA Program, and has been distributed to the Maryland Commission on Indian Affairs and known groups in Maryland identifying themselves as Indian. The inventory currently lists the partial remains of the approximately 139 Native American individuals, and includes, to the extent possible, an identification of the cultural affiliation of the remains. Under NAGPRA, 'cultural affiliation' means there is a relationship of shared group identity that can be reasonably traced between a present day Federally recognized Indian tribe and an identifiable earlier Indian group, and that the remains can be attributed to the earlier group. The cultural affiliation of the remains of 103 of the individuals, plus six small groups of teeth, small bone fragments, or cremated bone fragments, cannot be established in the manner prescribed by NAGPRA. Available evidence regarding the remains of the remaining thirty-six (36) individuals listed in the inventory suggests that they can be reasonably associated with the historically documented Piscataway Indians. However, because no present-day Piscataway groups have yet been recognized under Federal

procedures, a determination of cultural affiliation as defined by NAGPRA cannot be made, and all of the remains in MHT's collections are considered 'culturally unidentifiable' for purposes of NAGPRA (43 CFR § 10.10 (g)). While NAGPRA specifically seeks repatriation of Native American remains to lineal descendants or culturally affiliated tribes, the inability to establish either claimant category for any of the remains currently held by the MHT precludes this desired outcome.

Disposition of Culturally Unidentifiable Human Remains. Under NAGPRA regulations "culturally unidentifiable" human remains are reported to the NAGPRA Review Committee, which is responsible for compiling an inventory of them, and for recommending actions for their disposition (43 CFR § 10.10 (g)). A reserved section of the NAGPRA regulations (§ 10.11) will specify procedures for the disposition of culturally unidentifiable human remains, but to date this section has not been finalized. Meanwhile, Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains were most recently published at 65 FR 36462 (June 8, 2000). These recommendations provide disposition solutions for the return of culturally unidentifiable remains: (1) that were recovered from tribal land, (2) that were recovered from aboriginal land of an Indian tribe, or (3) when there is a relationship of shared group identity with a non-Federally recognized Indian tribe. Since 1994 the Review Committee has reviewed 41 requests for the disposition of culturally unidentifiable human remains. In 10 of these cases, the Review Committee has agreed with the requesting Museum or Agency that disposition to a non-Federally recognized tribe is appropriate. In all of these cases, however, the non-Federally recognized tribes have been recognized by a State. Disposition to Federally recognized tribes (18 instances) was based on 'aboriginal lands' (10 times). Maryland lacks lands that meet the Federal regulatory definition of aboriginal lands, which is based on a land claim decision by the Indian Claims Commission or the United States Court of Claims.

While the Review Committee's published guidelines regarding requests for disposition of culturally unidentifiable human remains do not specify consultation requirements, a review of their decisions to date indicates that wide consultation is expected. Nine of the cases that have come before the Review Committee have resulted in a call for additional consultation. In the regulations, 'consultation' is clearly defined as occurring with known lineal descendants and officials from known or likely culturally affiliated tribes, or tribes with involved tribal or aboriginal lands (43 CFR §10.5, § 10.8 (d), and §10.9 (b)). The Review Committee does not require museums to consult with non-Federally recognized tribes, but museums may do so. A review of requests favorably decided by the NAGPRA Review Committee indicates that broad consultation with non-resident Federally recognized Indian tribes that may be affected is expected.

Review Process. The process for review begins with a written request from the affected parties to the Review Committee ([http://www.cr.nps.gov/nagpra/REVIEW/Review\\_and\\_Findings\\_Procedures.htm](http://www.cr.nps.gov/nagpra/REVIEW/Review_and_Findings_Procedures.htm)). Affected parties are defined as museums, Federal agencies, and tribes, although non-Federally recognized tribes may also be included. The written request includes:

- a. statement outlining facts relevant to the request, including citations of applicable portions of NAGPRA and NAGPRA regulations;
- b. statement of the affected party's (ies') interpretation of the facts;
- c. proposed resolution.

If the Review Committee finds the request complete, the requested review is scheduled, and notice is published in the Federal Register. All affected parties may make presentations in writing, in person, or both. Findings are published in the Federal Register, and sent to affected parties.

Summary. While NAGPRA was established for the expressed purpose of returning (repatriating) Native American human remains to appropriate parties, these parties are explicitly defined as lineal descendants and culturally affiliated Federally recognized Indian tribes. For those remains that cannot be reasonably determined to be affiliated with a contemporary tribe (that is, are “culturally unidentifiable”), the NAGPRA Review Committee can consider plans for disposition. All of the remains currently in the MHT collection are culturally unidentifiable for purposes of NAGPRA. Complicating the issue in Maryland is our current lack of Federally recognized tribes. While the Review Committee may consider disposition of culturally unidentifiable remains to State recognized tribes, Maryland currently lacks these as well.

Because designation of a new appropriate place of repose and transfer of human remains under State regulations (see below) would potentially affect MHT’s ability to respond to future requests for repatriation (and, as the Review Committee’s published recommendations make clear, “there is no statute of limitations for lineal descendants [or] Indian tribes . . . to make a claim”), the Review Committee is required to hear and make recommendations on such a plan.

The likely most difficult elements of such a plan include:

1. identification of affected parties under NAGPRA regulations.
2. consultation that meets NAGPRA regulatory standards.

The draft plan presented below is designed to address these issues.

### Maryland Code

Applicability. Maryland law includes explicit discussion of Native American human remains in the possession, custody, or control of the MHT (SF §5A-339 (b)). In particular, SF § 5A-339 (b) provides for the transfer of such human remains to descendants and culturally affiliated groups, or if the cultural affiliation of the human remains can not be established, to ‘an appropriate place of repose.’ Regulations (COMAR 05.08.07) implementing this section of Maryland law provide for a process that mirrors that of NAGPRA, including; (1) production and distribution of an inventory of human remains that includes a determination of lineal descent and cultural affiliation when possible, and (2) a process for the consideration of requests for transfer of remains to lineal descendants or culturally affiliated groups. In addition, the State regulations also

provide for the establishment of an appropriate place of repose for those remains that are not transferred.

Culturally Affiliated Groups. State regulations define cultural affiliation of Native American remains in the same manner as NAGPRA, a linkage between an identifiable past Indian group and a contemporary Indian tribe. An important difference between State regulations and NAGPRA, however, is the definition of Indian (or, in State regulations, Native American) tribe. For NAGPRA, 'Indian tribe' is restricted to those groups that have been 'Federally recognized.' Under State regulations, however, a 'Native American tribe' can be either: (1) a Federally recognized tribe, or (2) a State (Maryland or other State) recognized tribe, or (3) a group that, in the opinion of the Commission on Indian Affairs and the MHT, is likely to meet Maryland's recognition criteria (COMAR 05.08.07.02 (13)). Thus, State regulations would appear to be more liberal in the identification of legitimate claimants for transfer of human remains, yet this may be more apparent than real (see discussion under Transfer and Disposition, below).

The inventory prepared under NAGPRA by the MHT was required to address cultural affiliation. In all cases excepting the remains (36 individuals) recovered from the Accokeek Creek site (18PR8), the MHT NAGPRA inventory concludes that the remains are 'culturally unidentifiable based on currently available information.' However, for the human remains recovered from the Accokeek Creek site, the inventory concludes that the 'preponderance of [the] evidence indicates Piscataway/Conoy.' Because a known Susquehannock fort was also located nearby, and was investigated at the same time as the Accokeek Creek Piscataway village, the inventory holds out the possibility that some of the Accokeek Creek Site human remains may be Susquehannock. It is important to note that the inventory's presentation of cultural affiliation does not follow either State or Federal definitions in the case of the Accokeek Creek site human remains; while the remains are likely associated with the historically documented Piscataway Indians known to have inhabited the north shore of the Potomac River in the early 17<sup>th</sup> century, both regulatory definitions require a link between such an established past cultural entity and a contemporary Indian tribe for cultural affiliation to be established. No current groups identifying themselves as Piscataway have yet been granted Federal or State recognition as an Indian tribe. As a result, the cultural affiliation of all the Native American human remains in the MHT NAGPRA inventory should properly be listed as 'culturally unidentifiable.'

Transfer and Disposition. State regulations do not use the term 'repatriation', but rather speak of 'transfer' to lineal descendants or culturally affiliated groups, and 'disposition' of unaffiliated human remains. Transfer under State regulations is different from repatriation under Federal regulations mainly in the definition of the groups to whom human remains can be delivered (e.g. cultural affiliation, see above). Because the definition of cultural affiliation under State regulations is more broad than the Federal standard, a potential conflict between the two must be considered. However, allowance for potential transfer of human remains to non-Federally recognized tribes is built into the Federal regulations under the as-yet unpublished section §10.11; for 'culturally unidentifiable' human remains, the Review Committee may determine that non-Federally

recognized tribes may be appropriate claimants, and such dispositions have been recommended by the Review Committee in the past. However, should the Review Committee agree with a proposed disposition of culturally unidentifiable human remains to groups not recognized by the State, not likely to gain recognition by the State, or not seeking recognition by the State, an important conflict with State regulations would result.

Disposition also means something different under State and Federal regulations. Under NAGPRA, 'disposition' essentially refers to repatriation, or transfer, of culturally unidentifiable human remains to Indian tribes. State regulations, in contrast, refer to disposition in two ways: 1) relinquishing ownership, possession, custody, or control to a claimant; or 2) establishing an appropriate place of repose for unidentifiable human remains.

Appropriate Place of Repose. For those human remains that cannot be, or have not been, transferred to successful claimants, State regulations (COMAR 05.08.07.09) require the Secretary to set aside a place meeting certain requirements. Specifically, the place must be:

1. solely for disposition of human remains,
2. not open to public view, and
3. not accessed except as required by law to ensure against loss, deterioration, or damage.

In addition, the human remains in the set aside appropriate place of repose will be:

4. not intermixed by ethnicity, descent, or place of discovery, and
5. available for removal for the purpose of transfer (e.g. repatriation).

The regulations specifically include recognition of the fact that the appropriate place of repose might be "below ground" (COMAR 05.08.07.09 (c)(2)). However, such a possibility is potentially in conflict with the requirements that the place of repose be one that is "conducive to [their] long-term preservation" (COMAR 05.08.07.09 (c)(2)), and that the human remains in the place of repose be available for possible future transfer to qualified claimants or for study (see later discussion).

The Department of Planning currently has a designated appropriate place of repose (see Introduction) located at JPPM.

Consultation. State regulations require consultation with individuals and Indian groups at several steps in the process. Except in the case of transfer for study, consultation is designed to facilitate the transfer of human remains to rightful claimants.

In compliance with the regulations (COMAR 05.08.07.03 (D)), the completed inventory of human remains was distributed to the Maryland Commission on Indian Affairs (established in Maryland Code Article 41 Governor – Executive and Administrative Departments: Title 6. Department of Human Resources: Subtitle 9. Commission on Indian Affairs). In addition, the regulations require that the inventory be shared with "other individuals, Native American tribes, or Native American cultural organizations"

which MHT determines are likely to assist in the identification of lineal descendants or culturally affiliated Native American tribes. To this end, the inventory was shared widely with groups identifying themselves as Maryland Indians.

Consideration of requests for transfer of human remains to descendants or culturally affiliated groups made under the regulations are another important point of regulatory consultation. During consideration of a request for transfer, the MHT must consider the comments of the Maryland Commission on Indian Affairs (the Commission). The Secretary of Planning is also required to consult with the MHT and the Commission when determining the appropriate place of repose. Such consultation was conducted during the 1994 determination of an interim appropriate place of repose.

The State regulations also consider the possibility of transfer of human remains for the purpose of study. If the remains being sought under such a request are Native American, consultation is required with lineal descendants or culturally affiliated Native American tribe, if known. Objection by either lineal descendants or culturally affiliated tribes leads to the automatic denial of the requested transfer for study. In addition, when presented with requests for transfer of Native American remains for the purpose of study, the MHT is required to consult with the Commission and the Maryland Advisory Committee on Archeology (established in SF § 5A-336). The MHT is required to consider the comments of both these groups.

Summary. Maryland law and regulations encourage transfer of Native American human remains to lineal descendants or culturally affiliated Native American tribes. They also direct the Secretary to designate an appropriate place of repose for those human remains that are not so transferred. All of the Native American human remains in the MHT collection are currently defined as culturally unaffiliated with a contemporary recognized or likely to be recognized Native American tribe, as defined by the regulations. As a result, none have been transferred, and all remain in the designated interim appropriate place of repose.

Any proposal to change the interim appropriate place of repose, will require consultation with, minimally, the Commission and the Advisory Committee on Archeology. In addition, changes to the current regulations may be needed if it is proposed to designate a new appropriate place of repose that is below ground.

## **PROPOSED PROCESS**

### **Principles and Goals**

The Native American human remains currently in MHT's possession have been in a designated interim appropriate place of repose for 13 years. Neither those at MHT tasked with maintaining the place of repose, nor those outside the MHT who have expressed an interest in transfer to them of these human remains, feel that the current disposition of

these human remains is satisfactory. The lack of successful claims for repatriation or transfer under existing State or Federal processes highlights the need for a new approach. It is, therefore, axiomatic that solutions being sought under the following proposal were not considered when either NAGPRA or State law and regulations were enacted. While this presents certain difficulties, it is a premise of this proposal that such solutions are possible if two guiding principles are followed:

1. The process of designating a new Appropriate Place of Repose for those Native American human remains currently in MHT's possession must be based on respectful consultation among affected parties.
2. All decisions adopted regarding the disposition of those Native American human remains currently in MHT's possession must be consistent with Federal and State law and regulations.

The following propositions are offered as points of departure for the consultations:

1. The appropriate place of repose for culturally unidentifiable/unaffiliated Native American human remains currently in MHT's possession is in the ground.
2. The location selected for the burial of the unidentifiable/unaffiliated Native American human remains currently in MHT's possession should be on State-owned or State-controlled property.

## **Process**

The following is proposed for all the Native American human remains in MHT's possession.

1. The Secretary, having decided that a change to the appropriate place of repose is desirable, shall instruct the MHT to approach the Commission to begin consultation directed toward assisting the Secretary in determining a new appropriate place of repose.
2. Should the Commission elect to participate with the Trust in this effort, each entity will designate persons who together will facilitate consultation. All designated persons will serve until the consultations are concluded, regardless of expiration of any terms of appointment to, or membership in, any other groups, commissions, boards, or committees.
  - a. Commission designees, up to a maximum of five, may include:
    - i. Commissioners,
    - ii. Persons of the various regions within the State, and
    - iii. Others, as deemed necessary or desirable by the Commission
  - b. Trust designees, up to a total of five, may include:
    - i. The Trust's Chief Archeologist,
    - ii. A representative of the Office of Preservation Planning and Museum Programs,



- iii. A designee of the Maryland Advisory Council on Archeology, with whom the Trust is required to consult (SF §5A-336 (h)), and
    - iv. A designee of the Council for Maryland Archeology, and
    - v. A designee from the Archeological Society of Maryland, Inc.
  - c. At their first meeting, to be held within thirty (30) days of all ten individuals being designated, the designees shall select two co-chairs. These individuals shall alternate the chairing of the working group meetings.
  - d. The designees will determine how consultation discussions will be scheduled and conducted. The Commission's Executive Director and the Trust's State Terrestrial Archeologist will assure that the designees are provided necessary technical and clerical assistance.
  - e. The views of interested parties identified by the designees shall be solicited and considered during the consultation discussions. The views of interested parties, including at a minimum those of Maryland Indian groups and of groups representing the archeological community in Maryland, shall be solicited by way of an opportunity for public comment at a minimum of two open sessions. One open session will include presentations by experts in archeology and anthropological analysis of human remains, and one will include presentations by experts in Native American spirituality and customary burial practices. Additional open sessions may be held at the discretion of the designees group. The designees shall also solicit written comments from identified interested persons and groups as progress warrants during the consultation process.
  - f. The designees may, at any time during their consultation, ask the Secretary to assist them in securing the services of an individual or individuals with expertise in mediation, conflict resolution, or meeting facilitation.
3. Consultation will begin with consideration of the two initial propositions. These propositions are offered to facilitate initial consultations, but are not meant to constrain the designees in their discussions. These particular propositions were selected as points of departure for the consultations as they (1) reflected the views of many participants to earlier consultation regarding the appropriate place of repose, and (2) are consistent with State law and regulations. The MHT will offer the following justification for the initial propositions:
- a. The new appropriate place of repose should be in the ground. This is intended to at least partially or symbolically restore the environment in which the human remains were originally interred, and honor the inferred intentions of those who conducted the original interment.
  - b. The new appropriate place of repose should be at a State-owned site. State law and regulations require that MHT retain access to remains placed in an appropriate place of repose. Designation of State-owned or controlled property as the place of repose means that no transfer (under State law) or disposition (under Federal law) will occur. While not completely avoiding conflict with State regulations (to be considered below), this will significantly simplify the designation.

4. In the event that designees of both the MHT and the Commission feel a consensus is likely regarding a new appropriate place of repose that is in the ground, the designees shall consider the provisions of the current State regulations that permit the temporary removal of remains in response to approved requests for transfer for study, and transfer to lineal descendants or culturally affiliated groups.
5. Should the designees reach consensus regarding the initial propositions, the designees will consult regarding the following:
  - a. Precise location of burial site or sites.
  - b. Manner of reburial, including rites applying to such reburial.
  - c. Accessibility of the burial site or sites for the purposes of rituals and remembrance.
6. If, at any time, consultation leads to consensus on a new appropriate place of repose, the MHT and the Commission designees shall recommend that the Secretary designate a new appropriate place of repose, in accordance with the designees' agreement.

Many possible outcomes of the consultation process might lead to a Secretarial decision to designate a new appropriate place of repose that involves no change in control and preserves the possibility of future transfer. Such an outcome would not necessitate consideration of regulatory changes, consultation with federally recognized tribes, or approval of the NAGPRA Review Committee.

Should the Secretary decide to designate a new appropriate place of repose that is in the ground, in accordance with the designees' agreement, the MHT shall pursue the following actions, as necessary, reporting to the MCIA in a timely manner regarding any progress:

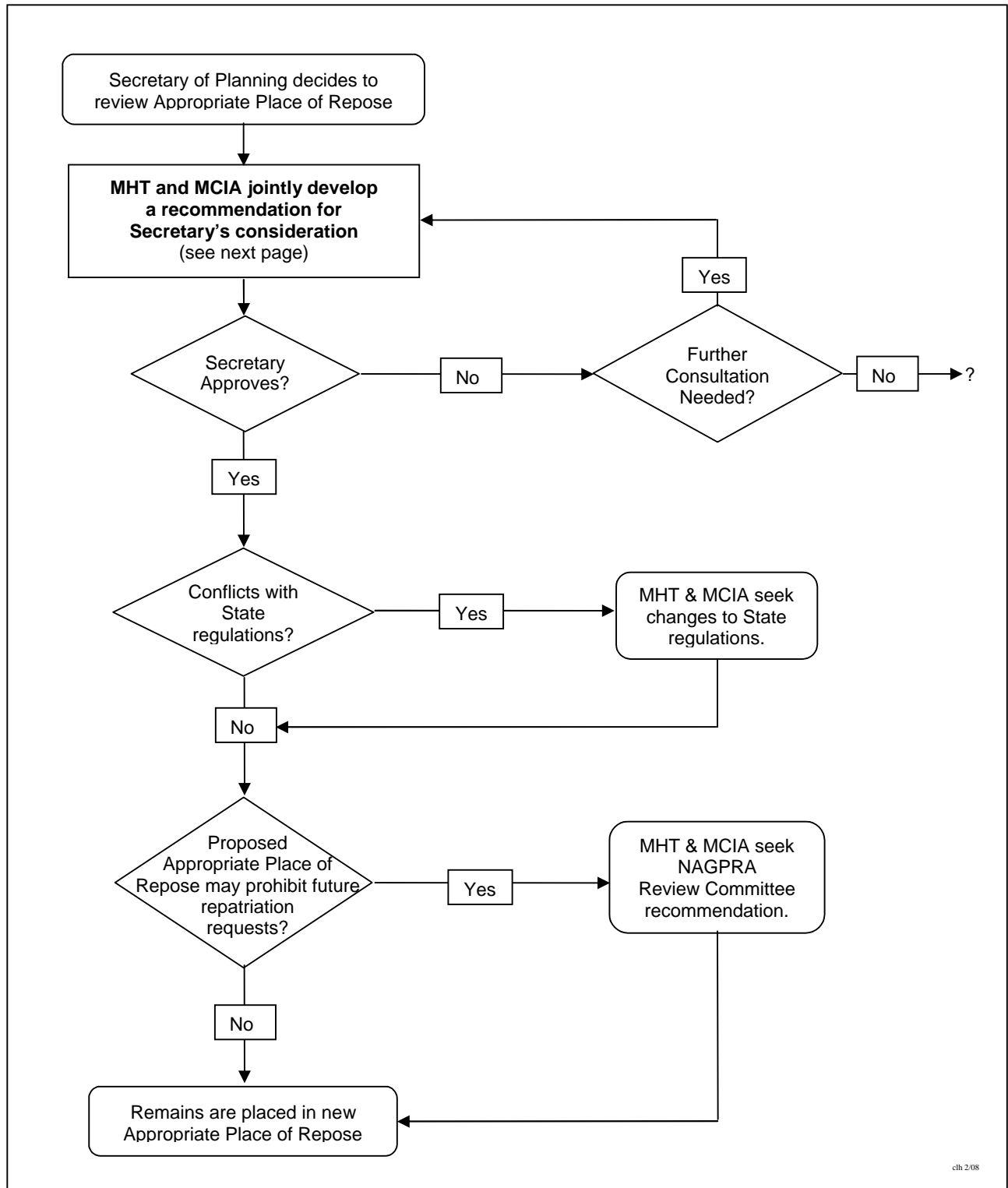
7. The MHT, with the support of the MCIA, shall pursue changes to State regulations, as necessary, that modify the requirement for long-term preservation and, possibly, future transfer, to be consistent with the designation of the Secretary.
8. The MHT shall, in cooperation with the National NAGPRA Office, identify federally recognized tribes that might have an interest in transfer to them of the human remains affected by the plan, and seek their agreement to the reburial plan.
9. The MHT shall prepare and forward a written request for review to the NAGPRA Review Committee. This request will be prepared in consultation with the Commission, and will include, as required, any statement of the Commission regarding its understanding of the facts, and of the proposal.
10. If the NAGPRA Review Committee recommends Secretary of the Interior approval of the plan, and the necessary State regulatory changes are adopted, the MHT shall carry out the provisions of the proposal.

If, after a period of one year, consultation among the designees of the Commission and the MHT fail to reach a consensus regarding the designation of a new appropriate place of repose, the designees shall produce a report for the Secretary that details areas of consensus and the issue(s) of contention. The report shall also present the opinion, or opinions, of the designees regarding the likelihood that further consultation will result in

consensus, and the willingness of the designees to continue consultation. Based on a review of the report, the Secretary shall either direct that the joint MCIA-MHT consultation be continued, or that it be ended. Should joint consultation be ended, the Secretary may consult independently with the MHT and the MCIA, or determine that further consultation is unlikely to be productive, or may notify the designees that the regulatory requirement to consult has been fulfilled. Should the Secretary choose to go forward with the designation of a new appropriate place of repose without agreement of the designees, MHT shall carry out steps 8 through 10 above, as necessary.

## Reconsidering the Appropriate Place of Repose in Maryland

### Full Process



## Reconsidering the Appropriate Place of Repose in Maryland

MHT and MCIA Consultation Process  
(Step 2 from Full Process, previous page)

